No. 75-1852

In the Supreme Court of the United States

OCTOBER TERM, 1976

LATHIA PAUL BANKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F. 2d 1336. The order of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976. The petition for a writ of certiorari was filed on June 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel at trial where he and a co-defendant whose interests were not conflicting were represented by the same attorney.

2. Whether counsel's failure to secure the attendance of two potential defense witnesses at trial denied petitioner effective assistance.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner and co-defendant Alvin Radford Dollar were convicted of armed robbery of a military commissary, in violation of 18 U.S.C. 2112, and were sentenced to twelve years' imprisonment. The court of appeals affirmed. *United States* v. *Banks*, 485 F. 2d 545 (C.A. 5), certiorari denied, 416 U.S. 987. Thereafter, petitioner filed the instant petition pursuant to 28 U.S.C. 2255 seeking vacation of his sentence. The district court denied relief (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

As fully set forth in the opinion of the court of appeals on direct appeal and in our brief in opposition to petitioner's original petition for a writ of certiorari (No. 73-5889), the evidence showed that four eyewitnesses identified petitioner and Dollar as the two men who robbed the post commissary at Fort McPherson, Georgia, at approximately 6:00 p.m. on December 17, 1971. The commissary manager identified both men at trial as the perpetrators of the robbery, although he had been able to identify only petitioner, and not Dollar, at a pretrial lineup (Tr. 34-36, 48). Susan Hager, another eyewitness, testified that she had observed petitioner's suspicious actions in the commissary earlier on the day of the robbery; she was, however, unable to identify Dollar (Tr. 159-161). Dorothy Martinez, the commissary cashier, identified Dollar at both the lineup and trial but failed to identify petitioner as one of the robbers

on either occasion (Tr. 79, 86-87). Patricia Mason also identified Dollar as one of the persons whom she saw climb over the base fence near the commissary shortly after the robbery; however, she was unable to identify petitioner (Tr. 121-122).

In their defense, petitioner and Dollar relied upon wholly unrelated alibi claims. Petitioner testified that he had been with his fiancee at the time of the robbery, and she supported his contention that he had been at her apartment from approximately 5:00 p.m. onward on the night of the robbery (Tr. 345). Petitioner also contended that he could not have climbed the fence to escape from the commissary, as witness Mason described the robbers' actions, because he was then suffering from a severely sprained ankle (Tr. 373-379). Petitioner's father and his fiancee corroborated this aspect of his testimony (Tr. 406). Dollar claimed that he had been delivering packages with a social worker at the time of the robbery (Tr. 354-355).

ARGUMENT

1. Petitioner contends (Pet. 6) that his trial attorney's joint representation of both himself and his co-defendant, with whom he alleges he had an irreconcilable conflict of interest, deprived him of the effective assistance of counsel. He claims that, because of his dual obligations, counsel was constrained in his cross-examination of the two government witnesses who identified petitioner as one of the robbers by his obligations to defendant Dollar and, similarly, could not develop the plausible argument that only Dollar, and not petitioner, had been involved in the robbery. However, after carefully reviewing the transcript, the courts below correctly found (Pet. App. 3a, 2b) that there was no conflict of interest

between petitioner and Dollar and thus no impropriety in their joint representation.

A criminal defendant is entitled to the assistance of counsel whose efforts are not impaired by the necessity of simultaneously representing possibly inconsistent interests. *Glasser* v. *United States*, 315 U.S. 60, 70. A conflict of interest is present whenever one co-defendant stands to gain significantly by counsel adducing probative evidence or advancing arguments that are damaging to the cause of another co-defendant whom that attorney also represents. See *Foxworth* v. *Wainwright*, 516 F. 2d 1072, 1076 (C.A. 5). In the instant case, there was no such conflict because the defendants' defenses were entirely consistent and were based on wholly independent alibi testimony and evidence concerning their personal reputation and character.[1]

Defense counsel thoroughly cross-examined the government's witnesses on behalf of both defendants (Pet. App. 3a). Counsel specifically inquired into the conditions at the pre-trial lineup, at which at least one eyewitness identified each defendant, and challenged the strength of the in-court identifications based upon the eyewitnesses' observations during the robbery. Counsel's failure to attack his identification by two of those witnesses as strongly as petitioner now deems appropriate was not

[1]Both defendants denied being at the army base on the day of the holdup and introduced separate alibi testimony of their whereabouts at the time of the robbery. From the nature of their protestations of non-involvement with the robbery scheme and absence from the scene of the crime, neither defendant could, consistently with his own defense, have inculpated the other. Thus, it was not the fact of joint representation but the content of petitioner's defense that prevented counsel from presenting a plausible argument that Dollar was guilty and petitioner innocent.

caused by counsel's oversolicitude for Dollar's defense at petitioner's expense. Those witnesses had already testified on direct examination that they were unable to identify Dollar as one of the robbers; thus, counsel's cross-examination was not hindered in the slightest degree by an inconsistent obligation to petitioner's co-defendant. Rather, counsel's decision not to attack the witnesses' unequivocal identifications more forcefully, thereby running the risk of emphasizing their testimony, was a purely tactical decision "clearly not the result of a conflict of interest" (Pet. App. 3a).

Petitioner also claims (Pet. 8-10) that the district court erred at the outset of the trial in not advising him and his co-defendant of the potential dangers of joint representation by one attorney and in failing to inquire into the possibility of a conflict of interest in their respective defenses. However, as we have shown, petitioner has not demonstrated that there was any conflict between his position and Dollar's or that he was prejudiced in any way by their joint representation. In any event, the possibility that a substantial conflict of interest might arise during the course of the trial was not reasonably foreseeable at the time counsel was appointed. Under these circumstances, no court of appeals has held that a district court violates any constitutionally protected right by failing to inquire into the possibility of a conflict of interest or failing to warn a defendant of the possible risks in joint representation and his right to appointment of another attorney.[2] While two

[2]See, *e.g.*, *Foxworth* v. *Wainwright*, 516 F. 2d 1072 (C.A. 5); *United States* v. *Alberti*, 470 F. 2d 878, 881-882 (C.A. 2), certiorari denied, 411 U.S. 919; *United States* v. *Williams*, 429 F. 2d 158 (C.A. 8), certiorari denied, 400 U.S. 947; *Fryar* v. *United States*, 404 F. 2d 1071 (C.A. 10), certiorari denied, 395 U.S. 964;

courts of appeals have, in the exercise of their supervisory powers, ordered the district courts in their jurisdictions affirmatively to determine at the time counsel is appointed that co-defendants understand the risks of joint representation and knowingly elect to be represented by the same counsel (see *Campbell* v. *United States,* 352 F. 2d 359 (C.A. D.C.); *United States* v. *Foster,* 469 F. 2d 1 (C.A. 1)), such an exercise of supervision presents no conflict warranting review.

2. Petitioner also contends (Pet. 15) that counsel's failure to secure the attendance of two potential defense witnesses at trial constituted ineffective assistance. Petitioner claims that Dr. Fred Bradford, who allegedly had examined his injured foot three weeks before the robbery, and his grandmother, who also was familiar with his injury, were vital witnesses whose testimony would have been "pivotal" (Pet. 15). This claim was considered and rejected by the courts below and does not warrant review by this Court.

Through the testimony of petitioner, his fiancee and his father, defense counsel introduced ample evidence supporting petitioner's claim that a disabling foot injury made it impossible for him to have participated in the robbery. Thus, the testimony of Dr. Bradford and petitioner's grandmother would merely have been cumulative of other evidence already before the jury. Counsel's failure to call them therefore cannot justify the award of a new trial. Moreover, decisions "as to whether or not to call certain witnesses to the stand * * * are tactical determinations." *United States* v. *Rubin,* 433 F. 2d

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Glavin v. *United States,* 396 F. 2d 725 (C.A. 9), certiorari denied, 393 U.S. 926.

442, 445 (C.A. 5). It is well established that the tactical conduct or strategic miscalculations of counsel afford no constitutional grounds for relief. *McMann* v. *Richardson,* 397 U.S. 759, 771; *United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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